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January 28, 2019

BY E-SUBMISSION

Roxanne L. Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Re: 1199SEIU United Healthcare Workers East
Comment on Proposed Rulemaking FR 2018-19930
(Joint Employer Proposed Rule Making)

Dear Ms. Rothschild and Members of the National Labor Relations Board:

As General Counsel for 1199SEIU United Healthcare Workers East ("1199SEIU"), I write to strongly oppose the National Labor Relations Board's ("NLRB" or "Board") proposed rule redefining the joint employer standard ("proposed rule" or "rule"). The proposed rule is both substantively and procedurally defective. Implementation of the proposed rule would erode the fundamental right of employees to collectively bargain with the employer that effectively determines their critical terms and conditions while allowing employers to structure their businesses in a way that avoids responsibility for violations of the labor laws the NLRB is tasked with enforcing. The rule will fundamentally deprive working people of an effective voice in their workplaces. Further, the proposed rule does not provide clarity to the healthcare industry that we serve. For these reasons, 1199SEIU urges the NLRB to fulfill its duty to encourage collective bargaining and not move forward with the rule redefining joint employment as proposed.

1199SEIU's Interest in the Proposed Rule

1199SEIU is the largest healthcare workers' union in the United States with more than 430,000 members in five states along the Eastern seaboard—Massachusetts, New York, New Jersey, Washington, D.C., and Florida. Our members work in acute care hospitals, nursing homes, clinics, home care settings, community-based clinics, and pharmacies as nurses, nurses aides, techs, lab workers, clerks, housekeepers, dietary workers, transporters, pharmacists, social

°Admitted in NY, MA and DC △Admitted in NY and NJ •Admitted in NY and CT •Admitted in NY and DC

workers, physician assistants and many other types of medical professionals. We are the largest and fastest-growing healthcare union in the nation.

Since our founding in 1932, our mission has been to stand up for quality healthcare, good jobs and social justice for all. By having an effective voice in the workplace, 1199SEIU has won the highest standards for healthcare workers in the country, including good wages and benefits, safe staffing, paid time off, secure retirement, model childcare, and education benefits and a real voice in the workplace. Our members are politically engaged and active. We are affiliated with the Service Employees International Union ("SEIU") which has over 2 million members and is one of the largest labor unions in North America.

1199SEIU submits these comments to share our perspective as healthcare workers and provide guidance to the Board so that any new rule concerning the joint employer standard reflects the purposes of the Act, the core interests of workers, and realities of the modern healthcare industry.

Joint Employment in the Healthcare Industry

1199SEIU's members work in New York City flagship hospitals, rural nursing homes, clinics, pharmacies, and provide in-home care for the elderly. Regardless of the job setting, the primary employers of our members (*e.g.*, hospitals, nursing homes, healthcare agencies), often outsource key aspects of their businesses to cut costs, avoid legal obligations and increase their flexibility. The outsourcing of healthcare jobs has historically impacted lower-wage, labor-intensive tasks of cleaning, serving food and doing laundry. And while the last few decades brought more outsourcing of billing departments, laboratories and certain professional services, we are now confronting complex employment arrangements involving ever increasing numbers of our highest skilled members working in direct-care clinical settings.

No longer do we just see the use of agency or temporary nurses supplementing the work of staff nurses, but entire practice areas or entire job classifications within acute care hospitals are being outsourced. As an example, 1199SEIU represents some of the most highly-trained and highest paid clinical professionals in New York City—physician assistants.[1] Given that these clinical professionals work under the direction of a physician, hospitals often seek to contract their services through large physician groups or by other arrangements. As with most outsourcing, it leads to finger pointing at the bargaining table over who controls economic decisions and generates unaccountability in day-to-day working relationships, which in this industry directly impacts patient care.

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[1] Physician assistants are state-licensed, credentialed health care professionals who practice medicine with physician supervision, performing an extensive range of medical services in nearly every medical and surgical specialty and health care setting. They take patient histories and perform physical exams, diagnose illnesses, develop treatment plans, order lab tests, prescribe medications, counsel and educate patients, suture wounds and assist in surgery. *See* https://medicine.yale.edu/pa/profession/index.aspx (last visited 1/24/19).

We are stymied at the bargaining table when hospitals and nursing homes are not present to discuss the working conditions of medical professionals providing care in their facilities. Contracting employers claim they cannot afford wages and benefits without an increase in funding from hospitals and nursing homes and/or that they are unable to resolve particular workplace disputes. Core terms and conditions of employment, such as direct supervision, working hours, patient census, the provision of supplies, and general health and safety concerns are dictated by the hospital or nursing home, but the structure of the service contracts between the supplying employer and the hospital/nursing homes makes it all but impossible to address working conditions without having a hospital or nursing home employer at the bargaining table.

The employment status of medical professionals working in clinics and hospital-affiliated physician practices are also becoming more complicated. Doctors affiliated with hospitals are supplied staff for their private offices/clinics by hospitals under the facade of management service organizations under their command. While the doctors and hospital exercise control over the workers' terms and conditions of employment, deals are structured so that neither the individual doctors nor hospital is the employer of record. These byzantine relationships leave workers without recourse to bargain with the entity controlling their day-to-day working conditions.

Joint Employment in a Highly Regulated Industry

The healthcare industry offers some of the most regulated workplaces in the country. Providers must maintain clinical and environmental standards set by public law or risk losing accreditation and funding. When a healthcare facility is reviewed for accreditation, every facet of the clinical care and clinical environmental is scrutinized, resulting in periodic unannounced top-to-bottom inspections.[2]

The failure of a contracted housekeeping employee to satisfactorily clean a patient room presents a patient care, legal and public relations risk for a hospital. It could lead to a citation, and if uncorrected or too egregious, the eventual loss of accreditation, funding, and public confidence. Similarly, a nurse or other professional who fails to provide satisfactory treatment or diagnostic care puts a nursing home's license at risk. In sum, every person working in a healthcare setting—whether a pot scrubber or pharmacist—must perform his or her job consistent with standards that govern that particular healthcare provider. A healthcare provider's managers and supervisors are required by statute and in some instances by the mandates of their

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[2] The most widely respected accreditation comes from the Joint Commission (sometimes referred to as "JACHO"), an independent, not-for-profit organization, that accredits and certifies nearly 21,000 health care organizations and programs in the United States. The Joint Commission does not publish its standards of review. The comprehensive standards of the Joint Commission are developed with input from health care professionals, providers, subject matter experts, consumers, and government agencies (including the Centers for Medicare & Medicaid Services). They are informed by scientific literature and expert consensus.
See https://www.jointcommission.org/facts_about_joint_commission_accreditation_standards/ (last visited 1/24/19).

own professional licenses, to exercise control over the working conditions of contracted employees.

Keeping accreditation and complying with myriad rules and regulations governing their operation requires a healthcare provider to control everything that transpires under their licensure and/or within their facility. The fractured control exemplified by the proposed rule, not only threatens workers' terms and conditions but quality patient care. The proposed rule simply fails to address the realities of joint employment in this highly regulated industry by only looking at the exercise of direct and immediate control over a truncated list of terms and conditions of employment.

The Proposed Rule Replaces Well-Reasoned Case Law with Confusion.

The proposed rule aims to provide employers and unions with predictability and consistency with regard to determining joint employer status. The rule will not accomplish that goal in the healthcare industry. The proposed rule fails to reflect the joint employment reality we encounter in the highly regulated workplaces in which our members work. Most frustratingly, the rule incorporates vague terms and gives a list of "examples" that are in no way exhaustive and seemingly contradict other instruction within the proposed rule. The courts have recognized that joint employer issues are "simply a factual determination," making it a poorly suited topic for rule making. *Holyoke Visiting Nurses Assn. v. NLRB*, 11 F.3d 302, 307 (1st Cir. 1993).

In replacing well-reasoned cases originating in the healthcare industry predicated on actual employment situations, the Board now asks healthcare employers and unions to operate in a vacuum using undefined terms and wholly unhelpful "examples." By upending decades of case law as most recently considered in the *Browning-Ferris* decision,[3] the proposed rule will create confusion for those attempting to untangle complex employment relationships without any true fact-based guidance from the Board.

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[3] On the basis of the recent D.C. Circuit case alone, the Board should abandon its proposed rule. *See Browning-Ferris Industries of California, Inc. v. NLRB*, No. 16-1063, 16-1064 (D.C. Cir. Dec. 28, 2018) reviewing *Browning-Ferris*, 362 NLRB No. 186 (2015). The D.C. Circuit held that the right-to-control element of the joint employer standard "has deep roots in the common law" which forces the Board in the instant proposed rule making to "color within the common-law lines identified by the judiciary." *Browning-Ferris*, slip op. at 21. The proposed rule fails to do so because it precludes consideration of reserved or indirect control. *See Browning-Ferris*, slip op. at 4 and 23 (the common law "permits consideration of those forms of indirect control that play a relevant part in determining the essential terms and conditions of employment" and "is not woodenly confined to indicia of direct and immediate control").

The Proposed Rule Fails to Define Essential Terms and Conditions in the Healthcare Workplace

The proposed rule states that an employer will only be considered a joint employer where it shares or codetermines an employee's essential terms and conditions of employment, "such as hiring, firing, discipline, supervision and direction." 83 Fed. Reg. 46686. This statement provides no guidance as to whether the Board will consider other terms and conditions not included in this list. The proposed rule does not affirm that this is the full universe of "essential terms and conditions" to be considered nor does it specify what treatment should be given to other terms and conditions that prior configurations of the Board have found to be essential. *See*, *e.g.*, *Browning Ferris Industries*, 362 NLRB, slip op. at 15 (citing prior cases where the number of workers to be supplied, scheduling, seniority, overtime, work assignments and method of work performance were considered essential terms and conditions). An appropriately inclusive list of essential terms and conditions of employment would include mandatory subjects of collective bargaining.

Only recognizing control over hiring, firing, discipline, supervision and direction ignores other relevant conditions of employment. Eliminating consideration of workplace control that does not fall into one of these categories empowers employers to avoid accountability. Moreover, the twelve abridged "examples" provided with the proposed rule consider only an isolated condition of employment instead of the totality of conditions in a workplace. Such a simplified analysis does a serious disservice to a multifaceted legal question that demands thorough and precise analysis.

Workplace safety is a paramount concern for our members. Given that their own health and welfare is often at stake when providing care to others, our members prioritize workplace safety over many other terms and conditions of employment. Hospitals, nursing homes and home care agencies are responsible for setting policies directly impacting safety in the workplace. A contracted employee assigned to a hospital, nursing home or patient residence has little recourse through a contractor when presented with unsafe working conditions. In some instances, health and safety concerns can be categorized under the essential term and condition referred to in prior Board cases. But without a more definitive statement from the current Board majority, it is unclear under the proposed rule whether control over safety is considered an essential term and condition of employment.

To be clear, a hospital controls the movement of psychiatric patients within its walls and the ratio of contracted staff assigned to patients who might present a hazard to themselves or caregivers. A nursing home orders the supplies used by contracted staff tasked with disposal of bio-medical waste. And a homecare agency decides the acuity of patients to which it assigns contracted home-health aides. The proposed rule takes far too narrow a view of these essential terms and conditions of employment. It is ill-advised to exclude necessary parties from bargaining obligations over terms and conditions such as these, especially when worker health and welfare and patient care are at stake.

The Proposed Rule Leaves Parties to Speculate as to the Level and Type of Control Necessary to Find a Joint Employer Relationship

The proposed rule further requires a putative joint employer to "possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine." 83 Fed. Reg. 46686. Even aside from the admonitions of the D.C. Circuit that the proposed rulemaking take adequate consideration of the common law which it does not do, (*Browning-Ferris*, slip op. at 4), this requirement only adds ambiguity to the proposed test for joint employment. The word "substantial" is an undefined term with no legal precedent upon which to judge what might be considered adequate control under the test. The rule fails to give any demarcation for what is "direct" and "immediate." And, the final phrase "in a manner that is not limited and routine," consists not only of individually undefined terms but is vague as to whether the standard requires consideration of a manner of control that is "limited" but not "routine," the inverse situation, or only a manner that is both "limited *and* routine."

Finally, the proposed rule suggests that "it will be insufficient to establish joint-employer status where the degree of a putative joint employer's control is too limited in scope (perhaps affecting a single essential working condition and/or exercised rarely during the putative joint employer's relationship with the undisputed employer)." 83 Fed. Reg. 46687. This final qualification, along with citations to Board cases in the proposed rule creates a labyrinth of conflicting terminology that leaves parties to speculate as to the level and type of control over working conditions necessary to find a joint employment relationship.

Examining the rule's treatment of a single undisputedly essential term and condition of employment such as hiring illustrates how the proposed rule eliminates predictability. There is no dispute under the proposed rule (or prior Board precedent) that the function of hiring is considered an essential term and condition of employment for purposes of joint employer analysis. The proposed rule provides twelve examples intended to illustrate application of the new rule. *See* 83 Fed. Reg. 46697. Example 8 addresses hiring. It states in full:

> Temporary Staffing Agency supplies 8 nurses to Hospital to cover for temporary shortfall in staffing. Hospital manager reviewed resumes submitted by 12 candidates identified by Agency, participated in interviews of those candidates and together with Agency manager selected for hire the best 8 candidates based on their experience and skills. Hospital has exercised direct and immediate control over temporary nurses' essential terms and conditions of employment.

83 Fed. Reg. 46697.

Example 8 suggests that a putative employer's participation in hiring a group of eight employees on a single occasion rises to the level of direct and immediate control that would result in a joint employer relationship with a nursing agency. However, the rule states elsewhere

that it will be insufficient to establish joint employer status where the exercise of control is too limited in scope and perhaps "affecting a single essential working condition and/or exercised rarely during the putative joint employer's relationship with the undisputed employer." 83 Fed. Reg. 46687. It is unclear how one reconciles these statements. Either Example 8 is too simplistic or the qualification too sweeping.

Further complicating the treatment of this undisputedly essential term and condition of employment is a citation to a prior Board case delineating what the current Board considers too limited for control in the hiring process. Citing *Flagstaff Medical Center*, 357 NLRB 659 (2011) the proposed rule states that it is "consistent with the Board's present inclination to find that a putative joint employer must exercise substantial direct and immediate control before it is appropriate to impose joint and several liability on the putative joint employer and to compel it to sit at the bargaining table and bargain in good faith with the bargaining representative of its business partner's employees." 83 Fed. Reg. 46687.

In *Flagstaff Medical Center* the Board found that a contractor's participation in interviewing and hiring candidates was too limited to result in a joint employer finding because the hospital "did not approve all of" the contractor's hiring recommendations. 357 NLRB at 667 (rejecting a single recommended candidate precluded finding joint employment). In dissent, Member Pearce observed that Flagstaff Medical Center hired 14 of the 15 applicants that were interviewed, evaluated and recommended by the contractor and that the hospital did not hire any applicant not recommended by the contractor. *Id.* at 671 (noting that the record indicates the contractor "was the driving force" behind hiring). The current Board cites to *Flagstaff Medical Center* as an exemplar of the kind of control that is too limited to warrant a joint employer finding yet provides an illustration in Example 8, seemingly based on *Flagstaff Medical Center* that triggers far more questions that it provides answers.

So what does Example 8 mean against the backdrop of *Flagstaff Medical Center*? Does the current Board majority intend to suggest that joint employment will only be found if two parties jointly interview every candidate and "together" select each of them for hire? And if so, what does it mean to select a candidate for hire "together"? What if a party selects some candidates to interview, participates in those interviews and makes recommendations about hiring those particular individuals? What if a party selects a pool of candidates for joint interview, participates in those interviews and make a recommendation to hire only some of them? Must a party adopt all of the other parties' hiring recommendations for it to constitute joint decision-making?

The answers to these questions are less important than the disorientation they illustrate. The proposed rule sows confusion and uncertainty as to what constitutes direct and immediate control in the context of what is perhaps the most undisputedly essential term and condition of employment in a joint employer analysis.

Eliminating Bargaining Obligations in the Healthcare Industry Serves No One

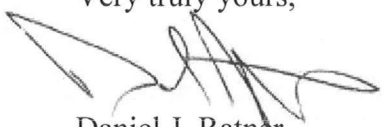
To say nothing of the Act's mandate to promote collective bargaining as a means to reduce labor unrest, public welfare must also be considered when eliminating necessary parties from bargaining in the healthcare industry. 1199SEIU's best contracts require management and labor to discuss the intersection of clinical care and working conditions in the context of patient care committees, health and safety committees and nurse practice committees. Committees such as these, *inter alia*, jointly set controls on the number and acuity of patients assigned to our members, set clinical practice standards, implement processes and approve of supplies used in clinical settings. If a contracted physician assistant treating a patient in the emergency room does not have the supplies or resources to do the best job possible, a practice committee is an unsurpassed option for ensuring that work is accomplished and excellent clinical care is provided. Having both a hospital and contractor at the bargaining table with the union allows for necessary adjustments to be made, not only improving the working conditions of our members but benefiting the patients we serve.

Proving a joint employment case each time an issue arises involving contracted work is beyond the means of any union or employer. We rely on the Board's precedents. There is no sound basis for the current Board majority to abandon clearly reasoned case law and replace it with a rule as imprudent and unclear as the one proposed. The proposed rule does not reflect realities in the healthcare industry and will create confusion and uncertainty in the industry.

Conclusion

For these reasons, the Board should abandon the proposed rule and remain true to the purpose of the Act.

Very truly yours,



Daniel J. Ratner

These comments are submitted by Service Employees International Union, Local 32BJ, a labor organization representing over 160,000 workers, primarily in the property services industry, in response to the Board's notice of proposed rulemaking issued on September 14, 2018.

Introduction

For the past forty years, Local 32BJ has bargained industry-wide collective bargaining agreements covering commercial office cleaners in New York City with the Realty Advisory Board on Labor Relations, Inc., a multiemployer association consisting of building owners and cleaning contractors. Local 32BJ also represents more than 25,000 workers at residential buildings in New York City. These workers are often jointly employed by the entity that owns the building and a managing agent. In addition, Local 32BJ has extensive experience bargaining with cleaning contractors and security contractors where the client shares or codetermines matters governing the employees' essential terms and conditions, but where the client does not formally participate in the bargaining process. These comments are informed by this real-world experience.

1. The Board Should Start Over in Light of the D.C. Circuit's Decision in *Browning-Ferris Industries of California v. NLRB*.

The D.C. Circuit's recent decision in *Browning-Ferris Industries of California v. NLRB,* 911 F.3d 1195 (2018) makes clear that the Board's proposed rule is not a viable starting point for determining when an entity qualifies as a joint employer. The proposed rule provides that an entity is not a joint employer where it possesses authority to control employees' terms and conditions of employment unless there is

evidence that the entity has actually exercised that authority. But, the D.C. Circuit has held that an employer's right to control is relevant to the existence of a joint employer relationship. Likewise, the proposed rule requires that a putative joint employer exercise "direct and immediate" control over employees' term and conditions, while the D.C. Circuit held that the "distinction between direct and indirect control has no anchor in the common law."

Thus, in order to survive judicial review, any final rule will necessarily depart so much from the proposed rule that it will not be the "logical outgrowth" of the proposed rule. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 543 (D.C. Cir. 1983). Accordingly, the Board should start the process over with a new proposed rule. "Otherwise, interested parties [do] not know what to comment on, and notice will not lead to better-informed agency decisionmaking." *Id.* at 549.

2. The Rule Will Not Foster Predictability and Consistency

In issuing the proposed rule, the Board majority asserted that the rule will provide employers and unions with "predictability and consistency" regarding determinations of joint-employer status. In fact, the rule will not provide predictability and certainty for four reasons. First, as courts have long recognized, whether an employer is a joint employer has always been a fact-intensive inquiry, and thus small factual differences may lead to different outcomes. Second, the proposed rule eliminates an aspect of *Browning-Ferris Industries of California, Inc.,* 362 NLRB No. 186 (2015) that provided greater certainty to all parties. Third, if

the intent of the proposed rule is to wipe the slate clean and start fresh with only a few examples to work from, then there will be considerable confusion until there is a substantial body of case law under the new rule. Finally, the examples in the new rule do not lend any clarity as to where the lines will be drawn.

The circuit courts have repeatedly observed that "a slight difference between two cases might tilt a case toward a finding of a joint employment." *Holyoke Visiting Nurses Assn. v. NLRB,* 11 F.3d 302, 307 (1st Cir. 1993), *quoting Carrier Corp.,* 768 F.2d 778, 781, n.1 (6th Cir. 1985); *accord North American Soccer League v. NLRB,* 613 F.2d 1379, 1382-83 (5th Cir. 1980)("minor differences in the underlying facts might justify different findings on the joint employer issue"). The proposed rule does not solve this problem, and it likely exacerbates it. In particular, the requirement that a putative joint employer exercise "substantial" control means that in any given case, the joint employer determination will turn on a determination as to whether any exercise of control is sufficiently "substantial." Likewise, the undefined term "limited and routine" creates additional unanswered questions about when exercise of control is sufficient to establish a joint employer relationship.

In light of the D.C. Circuit's *Browning-Ferris* decision, the Board must abandon its proposal that control must be exercised, rather than merely possessed. There is an additional practical reason why it makes no sense to require proof that control has actually been exercised. Whether a putative joint employer possesses the authority to set or codetermine the employees' essential terms and conditions of

employment is a fact that can often be determined from a review of documents. For instance, in *Browning-Ferris,* the agreement between BFI and Leadpoint gave BFI the authority to "reject any Personnel and … discontinue the use of any personnel for any or no reason." Thus, the contract gave BFI authority over an essential term or condition of employment. By contrast, the proposed rule requires proof that the authority was actually exercised, and that it was exercised in more than a "limited" way. According to examples 11 and 12, a single instance where the user exercises its authority is insufficient to meet this test (apparently regardless of the size of the workforce). On the other hand, if the user reminds the contractor of its authority with "some frequency" while voicing complaints about particular workers, this would be sufficient to make the user into a joint employer. Inevitably, under this proposed rule, "slight differences" in facts will lead to different outcomes – perhaps exercising the authority twice in last year would be insufficient, but three times would be deemed enough to create a joint employer relationship. Who can say?

Currently, when parties are attempting to structure their relationships and/or litigate cases presenting the joint employer question, they can look to a large body of case law to provide some guidance. Even in *Browning-Ferris,* where the Board overturned several cases, the majority cited many Board decisions that were consistent with the revised test. For instance, the Board cited five different cases where a joint employer determination relied on a finding that the user had a right to reject any of the contractor's employees. *Browning-Ferris,* slip op. at 18. Over the years, the Board has decided hundreds of joint employer cases and these cases

added up to a substantial body of common law. Now, the proposed rule would replace all of those detailed fact patterns with twelve bare-bones examples. This hardly helps provide clarity for interested parties.

We will discuss the examples contained in the proposed rule further below, but one shortcoming in the examples is that they fail to consider the interplay of multiple factors. Under existing law, both before and after *Browning-Ferris,* the Board has considered multiple factors in deciding whether an entity is a joint employer. So, for example, the type of supervision provided by a putative joint employer might be sufficient to support a joint employer relationship when combined with the right to refuse services of a particular employee, but not when standing alone. *SEIU Local 32BJ v. NLRB,* 647 F.3d 435, 444, n. 4 (2d Cir. 2011). The examples treat each term and condition of employment in isolation, so fail to consider whether, for example, the restriction on operating hours in Example 5 might support a joint employer finding when combined with other actions by the franchisor that affect the terms and conditions of the franchisee's employees.

3. The Proposed Rule is at Odds With the Findings and Policies Underlying the NLRA.

When Congress enacted the NLRA, it relied upon findings that "the refusal by some employers to accept the procedure of collective bargaining" led to "industrial strife and unrest." Congress further declared that it is the policy of the United States to mitigate that unrest "by encouraging the practice and procedure of collective bargaining." In order for collective bargaining to play that constructive role, it must serve as an effective mechanism for workers to address their terms and

conditions of employment. Yet, the proposed rule seems to contemplate that in many cases, workers will not be able to meaningfully bargain over wages, benefits, and working hours because the entity that effectively controls those terms cannot be brought to the table. Similarly, where workers are employed by Company A to provide services at the premises of Company B, they may lack the ability to bargain over Company B's drug testing requirement or over exposure to toxic substances at Company B's premises. This is surely not a recipe for labor peace.

The proposed rule might be based on the misguided notion that eliminating a bargaining obligation for lead firms that contract out for services will somehow insulate those lead firms from labor disputes. But nothing could be further from the truth. While Section 8(b)(4) might limit some tactics available to unions, the First Amendment still allows unions to wage robust public campaigns against any entity, even if the Board will not deem the entity to be a joint employer. So, for example, unions will still be able to use tactics such as staging a "mock funeral" outside a hospital, *see Sheet Metal Workers' Intl. Assn., Local 15 v. NLRB,* 491 F.3d 429 (D.C. Cir. 2007), and they will be able to leaflet, urge boycotts, station banners outside the entity's premises, and use the airwaves and the internet to publicize their dispute. Moreover, consistent with the Supreme Court's expansion of First Amendment protections in recent years, including, for example, its pronouncement that "a State could not ban campaigning with slogans, picketing with signs, or marching during the daytime," *Sorrell v. IMS Health Inc.,* 564 U.S. 552, 577 (2011), the scope of activity prohibited under Section 8(b)(4) will likely shrink in the years

ahead. The Act is based on the premise that it is preferable to channel disputes about wages, benefits, and working conditions to the bargaining table rather than relegating workers to the streets, and the proposed rule ignores that Congressional directive.

4. Narrowing the Joint Employer Test Will Make it More Difficult to Resolve Labor Disputes.

The cleaning contractors and security firms whose employees we represent often have contracts with their clients that give the clients the ability to set or codetermine the employees' terms and conditions of employment. In some cases, we have a bargaining relationship with the client as well. We have found that where we do not have a bargaining relationship with the client, it can be much more difficult to resolve disputes. Here are some recurring issues:

Client complaints about individual workers: One issue that often arises with cleaning contractors and security firms is that the client has lodged a complaint about a particular individual but there is no just cause to discharge the worker. Sometimes, the contractor knows up front that it lacks just cause to fire the worker. Other times, the contractor does fire the worker but an arbitrator orders reinstatement. If a union has no bargaining relationship with the client, this can create an extremely messy dispute because the contractor has no way to compel its client to allow a particular individual to work at the client's offices. These disputes have at times created standoffs between the Union and the contractor. This is especially true where the contractor has no other comparable nearby site to offer the employee. We have had a number of disputes drag on for months as we have

tried to figure out how to reach a mutually agreeable resolution with a contractor when the contractor's client has veto power over which employees are allowed to work on the premises. The Union may have tactics available to address these types of disputes (e.g. striking, if not barred by the collective bargaining agreement), but trying to put pressure on a contractor where the contractor is boxed in by its client risks poisoning the Union's relationship with the contractor.

In several instances, workers have filed charges against the Union when they were frustrated with the Union's inability to resolve one of these disputes on favorable terms, or unhappy about the settlement the Union reluctantly accepted. For instance, in Case 01-CB-107860, a worker complained that he was removed from a building and given a worse position at another building as a result of a false allegation against him. But, in that case, building management had requested his removal, and the Union had no mechanism to force building management to take the worker back even if the allegation against the worker turned out not to be true. Similarly, in Case 22-CB-227879, a worker filed a charge against the Union after the employer, a cleaning contractor, was unable to comply with a settlement because its client would not allow the worker to be placed at its building.

These types of disputes would not arise in the first place if the Union had a right to bargain with any client that has a right to reject particular employees.

Background checks or drug tests: Similar issues have arisen where clients have demanded that the contractors' employees submit to background checks or drug tests. Under the proposed rule, it is not clear if these requirements would be

sufficient to establish a joint employer relationship, particularly when they are first announced, since there would not yet be a record of workers losing their jobs as a result of these requirements. Unions have extensive experience bargaining over issues related to drug testing, but any contractual protection against arbitrary drug testing, or any guarantees regarding drug testing protocols would be irrelevant where the requirement is imposed by an entity that has no bargaining obligation.

Sexual Harassment: A contractual grievance procedure can be a very effective way to deal with sexual harassment claims. Employers are increasingly attentive to these claims, and when a credible claim is brought against a supervisor, the employer will often quickly take action to limit its own potential liability. But, in the case of cleaners or security officers, if the harasser is a property manager who does not work for the contractor, then the contractor does not have the power to address the claim. This is another reason why unions need to be able to bargain with all the entities that have control over working conditions.

Access for Union representatives: Access for Union representatives is a fairly standard part of any collective bargaining agreement. But, if the Union only has a bargaining relationship with a contractor, then the contractor must separately negotiate with its client before it can agree to terms of access for Union representatives. The Board has held that it may be unlawful for a client to deny access to the union representative of its contractor's employees, *see CDK Contracting Co.,* 308 NLRB 1117 (1992), but our Union does not want to have to

bring a case to the Board in order to secure routine access to the facility where its members work.

While control of access to the premises might not be sufficient under *Browning-Ferris* to create a joint employer relationship, by narrowing the joint employer definition, the proposed rule would make it less likely that unions will be able to bargain with entities that control access to workplaces.

Disputes about working hours: Another area where it has been more difficult to resolve disputes without having a putative joint employer at the bargaining table involves the Union's attempt to obtain full-time employment for workers who had been working part-time schedules. In some markets, the prevailing standard had been for office cleaners to work four-hour shifts, typically from 6 pm to 10 pm. In bargaining with cleaning contractors, our Union proposed converting these part-time jobs into full-time jobs. The bargaining over hours was made far more complicated because the building owners (the cleaning contractor's clients) were not at the bargaining table, yet extending the hours for the workers would have required the building owners to keep lights on and HVAC systems running for additional hours. The result was that instead of bargaining directly over the issue, the bargaining became more complex, with the contractors sometimes acting as intermediaries between the Union and the building owners, and with the Union making direct appeals to the building owners away from the bargaining table.

The proposed rule would codify this inability to bargain with entities that control the working hours of employees.

Health and Safety Issues: Contractors are sometimes unable to resolve health and safety concerns without the involvement of their clients. For instance, if office cleaners raise a concern about exposure to asbestos, the cleaning contractor cannot directly address that concern. Likewise, sometimes security officers are stationed in outdoor guard booths. In cold weather, security officers sometimes lodge complaints about the temperature in these booths, and the security contractor must appeal to its client in order to address those complaints. Similarly, where security officers have requested chairs, security contractors have been unable to provide those chairs unless the client is willing to provide them.

Contractor transition: Commercial building owners routinely switch from one cleaning contractor to another. This often occurs because of communication issues between the client and the contractor's manager, or because of some complaint about on-site supervision, but it is rarely because of a desire to replace the workforce. The commercial cleaning industry is marked by intense competition because there are no serious barriers to entry – very little capital is required, and when a contractor obtains a job it can generally hire the incumbent workforce.

Where the Union does not have a bargaining relationship with the owner, these contractor transitions can lead to major disputes. Experienced contractors understand that because labor costs represent the overwhelming percentage of their expenses, they must know those costs down to the last dollar. This includes not only hourly wages, but the exact amount of vacation and sick leave due to each worker, and any other benefit costs. Sometimes a new contractor underbids the

existing contractor without a full understanding of the workers' wages and benefits. The contractor may not have intended to reduce wages and benefits, but it may find itself hamstrung by its uninformed bid. The client may not have realized that it was risking labor unrest – it may have thought that the prior contractor was making an excessive profit. We have had situations where the new contractor had actually agreed to assume the predecessor's collective bargaining agreement, and submitted a bid based on the CBA, but without realizing that some workers were paid above-scale, or without understanding how benefit entitlements were calculated. In those cases, the contractor may try to force the Union to renegotiate the contract, or else it may go to the client and beg for more money. These kinds of disputes could have been avoided if the Union had bargained directly with the client. The client could, in the collective bargaining agreement, reserve the right to contract out the work while agreeing that any contracting out would not be used to undermine the contractual wages and benefits.

5. Joint Employer Bargaining Works Well and Often Makes it Easier to Resolve Disputes.

For many years, the Union has bargained with a multiemployer association in New York (the Realty Advisory Board on Labor Relations, Inc. (the "RAB") that represent both building owners and contractors, and through this bargaining relationship, it has often been able to resolve disputes efficiently, and in ways that have been mutually beneficial to workers and employers. While the dissent in *Browning-Ferris* spun out a series of hypothetical problems that might result from a finding that a cleaning contractor and its clients were joint employers, in fact, Local

32BJ's experience demonstrates that these hypothetical concerns are unfounded. When cleaning contractors and their clients bargain together, they have not demonstrated any trouble formulating coherent bargaining proposals, or providing meaningful responses to Union demands. There are some issues that clients care more about than contractors, and vice versa, but those differences are in the nature of differences that might be present in any employer bargaining committee – for instance, a finance manager might have different concerns than an operations manager or a human resources manager.

Joint employer bargaining benefits both employers and workers. The contractors and the building owners both want the owners to take part in collective bargaining because ultimately the building owners will pay the costs of any collective bargaining agreement. The contractors don't want to agree to expenses that they can't pass on to their clients, and the owners don't want to be saddled with costs that they didn't agree to pay. The building owners want to make sure they are not overcharged, but they also often want to ensure that money paid to a cleaning contractor gets passed through to workers rather than pocketed as profit by the contractor. By taking a direct role in labor negotiations, building owners can protect both of these interests.

And, contrary to the unsupported speculation in the *Browning-Ferris* dissent, in the real world we have not noticed any problem when it comes to clients and contractors dividing up bargaining responsibilities. The owners tend to drive the discussion regarding economic issues and the contractors defer to them because the

contractors understand that ultimately any costs have to be passed along to the clients. By contrast, the contractors tend to take the lead on issues such as filling open positions or workload disputes. And, when issues arise mid-contract, the Union generally approaches the contractor first, and the contractor lets the Union know if there is a need to involve the client.

6. The Proposed Rule Fails to Acknowledge How Current Board Law and Existing Contracting Practices Address the Liability Concerns of Potential Joint Employers.

In the notice of proposed rulemaking, the Board majority expresses concern about exposing business partners to joint and several liability, 83 FR 46686, but nowhere in the proposed rule does the Board even acknowledge how *Capitol EMI Music,* 311 NLRB 997 (1993) already effectively addresses this concern. Further, the proposed rule does not consider that potential joint employers may easily contract around these liability concerns.

In *Capitol EMI,* the Board held that a joint employer is not automatically jointly and severally liable for the acts of its coemployer. Instead, where a worker is fired in violation of the Act, the nonacting joint employer can avoid liability by showing that it neither knew, nor should have known of the reason for the other employer's action, or that if it knew, it took all measures within its power to resist the unlawful action. Applying this standard, in *Tradesmen Intl.,* 351 NLRB 579 (2007), the Board found no joint and several liability where the nonacting joint employer had no reason to know that a worker was fired because of his union activity. Likewise, in *America's Best Quality Coatings Corp.,* 313 NLRB 470 (1993),

the Board found that a company that recruited and supplied candidates for employment was not jointly liable with its coemployer for its coemployer's decisions to lay-off and delay recalling certain employees.

Apart from the protections afforded to joint employers in the *Capitol EMI* decision, before changing the definition of joint employer to help potential joint employers avoid liability, the Board should consider the extent to which entities can address this problem simply by altering their contracts. If a client is concerned that by hiring a contractor, it might potentially incur liability as a joint employer, the client may simply require the contractor to indemnify it for any liability that flows from the contractor's actions. Businesses routinely include these types of provisions in contracts. Any discussion of this issue must take into account that in almost every case the direct employer will have less power than the putative joint employer that it does business with. Thus, the putative joint employer will almost certainly be able to insist upon an indemnification clause, thereby solving any "problem" that the Board majority has identified.

7. The Proposed Rule Doesn't Take Into Account the Realities of Industries Like Commercial Cleaning.

There are several ways in which the proposed rule fails to take account how industries like commercial cleaning actually work.

A. The proposed rule fails to take into account the power dynamic between clients and contractors in the cleaning and security industries:

The proposed rule provides that a putative joint employer's contractual authority to control terms and conditions of employment is insufficient unless there

is evidence that the authority had been exercised in a "substantial" way. The examples, which are intended to clarify, highlight the shortcomings with this approach. Example 11 explains that the right to discipline a contractor's employees will support a joint employer relationship where (1) the client has the right to cancel its contract on short notice without cause; (2) the client has referenced its right to cancel the contract while lodging complaints about individual workers; and (3) "the record indicates" that the contractor would not have disciplined or would have imposed lesser discipline on the worker in the absence of the client's input. One problem with this example is that in the real world there would be no need for a client to reference its right to cancel the contract because the contractor would be acutely aware of that right. Cleaning contractors and security contractors understand that their livelihood depends upon keeping their clients happy, and they know they their clients can cancel their contracts at any time. The power that large clients have over cleaning or security contractors is like the power that employers have over workers. *Cf. Intl. Assn. of Machinists v. NLRB,* 311 U.S. 72, 78 (1940)("Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring the employer's strong displeasure"). So, if a client lodges a complaint about a particular worker, concern about keeping the client happy will color the contractor's entire investigation, and it doesn't necessarily matter whether the client specifically requests that the worker be fired. Also, if a client has lodged a complaint about a

worker, it's not clear what the proper comparator would be for determining what would have happened if not for the client's input.

Another problem with trying to sort through whether the client has actually exercised its contractual right to remove workers, is that the inquiry will likely take place months, if not years, after any particular incident. If a Union names a putative joint employer in an RC petition or in a ULP charge, any inquiry under the proposed standard would presumably look back at least two or three years to see how often the putative joint employer had exercised its contractual authority. Each incident would then require a separate mini-trial to try to figure out the counterfactual of what the contractor would have done in the absence of input from the client.

B. The proposed rule fails to take into account how contract rates are set in industries where the contractor is essentially only providing labor.

The proposed rule offers two examples of how a client might exercise some control over wages and benefits of its contractor's employees, but the examples are unrealistic. In Example 1, the contract sets a maximum reimbursable labor expense "while leaving Company A free to set the wages and benefits as it sees fit." In Example 2, "Company B establishes the wage rate that Company A must pay to its employees." In the cleaning and security industries, there is generally no practical difference between Example 1 and Example 2. In most cases, the contract price will be set based on the contractor's representations about labor costs, but the contract itself may not explicitly set forth the wage rate. It is not clear from Example 1 if the intent is to say that Company B is not a joint employer as long as

Company A has any discretion to alter the mix between wages and benefits even if Company A has no discretion to increase the combined total of wages and benefits. If that was the intent, it is absurd to say that in that circumstance Company B has not exercised control over the wages and benefits of Company A's employees. It is also at odds with the policy underlying the NLRA. Congress intended that workers would be able to raise their wages through collective bargaining, not merely that they could reallocate money they are already receiving. Furthermore, in Example 1, depending upon where the maximum reimbursable cost is set, it may preclude any bargaining over wages, and at a minimum, it will almost certainly meaningfully affect the employees' wages.

C. The Proposed Rule Fails to Acknowledge That in Many Occupations, Supervision Does Not Involve Telling Workers How to Perform Their Jobs.

While the proposed rule does not specifically address the type of supervision required to make a joint employer finding, it resurrects language used in earlier cases to narrow the circumstances where the Board would make a joint employer finding. Any joint employer standard should take into account that in many occupations, supervision does not involve telling workers how to perform their jobs. The Board recognized this for cleaners in *Syufy Enterprises,* 220 NLRB 738 (1975). There, the Board observed that "while janitorial tasks may be routine they often also are of such a nature that they require a meticulous attention to detail and vigilant if not constant supervision." *Id.* at 740. In fact, in the commercial cleaning

industry, supervision generally consists of checking work after-the-fact and asking workers to redo any tasks that were not performed properly.

There are many other occupations where supervision does not generally include telling someone how to perform their work. The First Circuit recognized in *Holyoke Visiting Nurses Assn. v. NLRB,* 11 F.3d 302 (1st Cir. 1993) that even though nurses hired through a referral agency were professionals who did not need instruction about how to perform their work, "that does not negate the power of supervision and direction that Holyoke exercised over them once they reported to work." *Id.* at 307.

8. Routine Components of Contracting Often Implicate Terms and Conditions of Employment.

In remanding the *Browning-Ferris* case, the D.C. Circuit directed the Board to clarify which types of indirect control would be relevant in a joint employer determination. In doing so, the court observed that "routine contractual terms, such as a very generalized cap on contract costs, or an advance description of the tasks to be performed under the contract, would seem far too close to the routine aspects of company-to-company contracting to carry weight in the joint-employer analysis." As the Board considers this guidance, it must bear in mind that in some cases a "routine contractual term" will directly implicate the terms and conditions of employment. This is particularly true in industries such as commercial cleaning or security where the cost of a contract is almost entirely the cost of labor.

If a client is purchasing a product or a combination of goods and services, then a "generalized cap on contract costs" might not directly implicate the terms

and conditions of employment for the employees of the contractor because the contractor would have a variety of options to stay within the cap on costs. But, on the other hand, where the client is purchasing cleaning or security services, a cap on contract costs effectively means a cap on wages and benefits, and thus, it does directly implicate the essential terms and conditions of employment.

At the same time, the Board can easily alleviate the concerns raised by Judge Randolph regarding an individual who hires a lawn service company. It's true that if he owned a vast estate and, as a result, hired a lawn service company to work on his premises full-time, and he set the hours of work, the wage rate, and required the use of certain equipment, he would be a joint employer. But, if he only paid the lawn service company for two hours a week, and the same employees who worked on his property also worked for many other clients, then he would not be their joint employer. The question is how much control a particular client has over the terms and conditions of the contractor's employees, and the more time the contractor's employees spend on the client's premises, the more likely the client will be their joint employer. Figuring out the precise place to draw the line is something better left to adjudication where the Board has a full record with all the relevant facts.

9. Collective Bargaining Can Be Meaningful Even if it is Limited in Scope.

Twenty-four years ago in *Management Training Corp.,* 317 NLRB 1355 (1995), the Board recognized that "judging in each case the employer's ability to bargain about certain specified topics invites lengthy litigation and controversy which the parties and the Board can ill afford." *Id.* at 1358. Since the Board

decided *Management Training,* unions have often bargained with government contractors even though the governmental entity controls some of the terms and conditions of employment. While this is less than ideal, the bargaining can still be "meaningful." In fact, in *Browning-Ferris,* the dissenting Board Members cited *Management Training* for the proposition that bargaining can still be meaningful even if an employer lacks control over a substantial number of essential terms and conditions of employment. *Browning-Ferris,* slip op. at 43 (Members Miscimarra and Johnson dissenting). The difference between *Management Training* and the Board's approach to the joint employer issue is that the bargaining in *Management Training* was circumscribed because the Board lacked jurisdiction over one of the employers. Thus, the choice was between limited bargaining and no bargaining, and clearly limited bargaining was preferable. By contrast, if there is no jurisdictional bar, the Board should not artificially narrow the scope of bargaining.

Moreover, experience under *Management Training* shows that bargaining over a limited range of terms and conditions can be "meaningful." In addition, there is no evidence that *Management Training* has led to a flood of Board cases where unions have tried to force employers to bargain over issues that were out of the employer's control. At the same time, trying to determine how many terms and conditions, or which terms and conditions a putative joint employer must control in order for bargaining to be "meaningful" is impractical, if not impossible. For this same reason, the Board should follow the advice of former Board Member Raudabaugh and consider a putative joint employer's involvement in determining

all terms and conditions, rather than limiting the inquiry to "essential" terms. *See Pitney Bowes, Inc.,* 312 NLRB 386, 386, n.1 (1993). At a minimum, if the Board continues to look to "essential" terms, the Board should follow the approach it took in *Browning-Ferris,* where it explained that essential terms include not only wages and benefits, and hiring, firing, and discipline, but also include scheduling, assigning work, setting staffing levels, controlling overtime, and more.

Even when unions and employers have had the opportunity to bargain over the full range of issues, strikes and lockouts have often occurred or been extended over a single issue. *See, e.g., TNS, Inc.* 309 NLRB 1348 (1992)(workers struck over health and safety); *Gazette Publishing Co.,* 101 NLRB 1694, 1698 (1952)(workers struck in support of proposal prohibiting employer from firing workers without just cause); *Eastern Massachusetts Street Railway Co.,* 110 NLRB 1963, 2004 (1954)(union spokesperson stated that reinstatement of 19 employees was sole remaining strike issue in a strike affecting 1,700 employees). Obviously, in any case where a single issue has led to a strike, bargaining over that issue was certainly viewed as "meaningful" by the parties.

If an entity has control over or co-determines any terms and conditions of employment, the Board should find that the entity is an employer, and it should allow the parties to decide whether bargaining will be fruitful. If an entity has no control over particular terms and conditions, it can just notify the union that its co-employer has exclusive control over those terms. Unions have nothing to gain by trying to bargain over an issue that an entity does not control.

10. The Challenge of Determining When an Entity is a Joint Employer Does Not Lend Itself to Rulemaking.

Many years ago, the Supreme Court observed that a

> problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-by-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards.

SEC v. Chenery Corp., 332 U.S. 194, 203 (1947). The determination of when an entity is a joint employer is exactly this type of problem. As the Board has acknowledged in promulgating the proposed rule, "the Board's joint-employer standard … must be consistent with the common law agency doctrine." 83 FR 46683. In *Browning-Ferris,* the Board recognized that in light of the multi-factor common law test for determining the existence of an employment relationship, the Board "cannot attempt today to articulate every fact and circumstance that could define the contours of a joint employment relationship." *BFI,* slip op. at 16.

The examples included in the proposed rule only hint at the wide variety of settings where the joint employer issue arises. For instance, when a building owner contracts for security services, the contract typically provides a fixed number of workers and the precise hours of coverage. Thus, when the building owner agrees to a price for that contract, it is necessarily codetermining the wages paid to the security officers who provide the service. By contrast, there may be other services where the price of the contract leaves the contractor with a great deal of flexibility over how to provide the service.

Rulemaking might make sense if it were possible to replace a multi-factor test with a bright-line rule, but the proposed rule makes clear that this is not the case. Instead, the proposed rule would replace a multi-factor test with a different multi-factor test. And, even if the rule included twenty-four or thirty-six examples instead of twelve, it would inevitably leave many unanswered questions since it cannot possibly anticipate and account for the "specialized" and "varying" nature of circumstances where the joint employer issue arises.

Conclusion

The Board should abandon the proposed rule because it is at odds with the policies underlying the Act, it will not foster predictability and consistency, and it will make it more difficult to resolve labor disputes.

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